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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MARK STOYAS, NEW ENGLAND TEAMSTERS & TRUCKING INDUSTRY PENSION FUND, and AUTOMOTIVE INDUSTRIES PENSION TRUST FUND, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

TOSHIBA CORPORATION, a Japanese Corporation,

Defendant.

Case No. 2:15-cv-04194-DDP-JC

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT TOSHIBA CORPORATION'S MOTION TO DISMISS

Date: May 16, 2016
Time: 10:00 a.m.
Courtroom: 3
Judge: Hon. Dean D. Pregerson

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I. INTRODUCTION

Plaintiffs' Opposition fails to justify the filing of this action in this Court (or anywhere else in the United States):

As to Plaintiffs' U.S. Exchange Act claims, Plaintiffs cannot satisfy *Morrison*'s bright-line, two-pronged test. Plaintiffs themselves admit (Opp'n at 7) that the unsponsored ADRs — securities created and issued by third-party depositary banks — are not registered on any "national securities exchange" as that term is used in Section 10(b). And, contrary to Plaintiffs' arguments (Opp'n at 5-9), over-the-counter trading in those ADRs does not satisfy *Morrison*'s first prong, which strictly requires registration on a "national securities exchange." *Morrison*, 561 U.S. at 266-67 (quoting "security registered on a national securities exchange" from Section 10(b) and adopting that term as touchstone for first prong); *Georgiou*, 777 F.3d at 134-35 (holding that OTC markets "are not national securities exchanges within the scope of *Morrison*").

Furthermore, while Lead Plaintiff alleges that it purchased ADRs in the United States (Am. Compl. ¶ 19), that allegation does not satisfy *Morrison*'s second prong, because Lead Plaintiff does not, and cannot, allege that it transacted with Toshiba in purchasing the ADRs. *Morrison* makes clear that the U.S. Exchange Act does not apply to "any person insofar as he transacts a business in securities without the jurisdiction of the United States." *Morrison*, 561 U.S. at 268 (quoting 15 U.S.C. § 78dd(b)); *Parkcentral*, 763 F.3d at 207, 216 (holding *Morrison*'s second prong not satisfied by domestic transaction where defendant was not party to transaction and "complaints concern statements made primarily in Germany with respect to stock in German company traded only on exchanges in Europe"). Plaintiffs' U.S. Exchange Act claims, in short, do not fall within either of *Morrison*'s two prongs and are therefore foreclosed by *Morrison* and its progeny.

As to Plaintiffs' Japanese-law claim, Plaintiffs suggest that Toshiba merely objects to the application of Japanese law in a U.S. court. Opp'n at 27, 30. But

Toshiba raises a more fundamental comity concern, recognized in *Morrison*, 561 U.S. at 269-70, that this Court's adjudication of Plaintiffs' Japanese-law claim would interfere with a "core prerogative" of Japan to regulate its own securities exchanges and adjudicate claims under its own securities laws. *See also Mujica*, 771 F.3d at 606-07 ("The closer the connection between the conduct and core prerogatives of the sovereign, the stronger that sovereign's interest."). So powerful is this comity concern that Plaintiffs are unable to cite a single U.S. case adjudicating a claim under the securities laws of any foreign country (Japan or otherwise).

Plaintiffs also have failed to overcome Japan's superior interest in this litigation, given that the alleged misstatements and omissions were made in Japan by a Japanese corporation listed on Japanese stock exchanges and that Plaintiffs purchased their Toshiba common stock on those exchanges in Japan. And Plaintiffs do not dispute that Japan is an adequate alternative forum. While Plaintiffs identify possible legal obstacles to their claim under Japanese law (Opp'n at 25, 32), any such legal obstacles Plaintiffs might encounter in Japan would also exist in a U.S. court applying the same Japanese law.

Finally, Plaintiffs fail to overcome Toshiba's showing that Japan is the more convenient forum under a conventional *forum non conveniens* analysis. *Id.* at 31-39. Plaintiffs' choice of this forum deserves less deference in the class-action context, particularly because this is not the home forum of any of the Plaintiffs. Furthermore, potential evidence and witnesses are overwhelmingly located in Japan. And while Plaintiffs question the relevance of the Japanese witnesses and evidence identified by Toshiba (*id.* at 33-35), these are precisely the witnesses and evidence referenced repeatedly by Plaintiffs in the Amended Complaint.

In sum, Plaintiffs cannot state a claim under the U.S. Exchange Act, and their Japanese-law claim belongs in Japan. This action should be dismissed, in its entirety, with prejudice.

II. ARGUMENT

A. Plaintiffs Fail To Overcome *Morrison*'s Bar To Their U.S. Exchange Act Claims

Contrary to Plaintiffs' assertion (Opp'n at 4), Toshiba does not maintain categorically that *Morrison* "prevents enforcement of the U.S. securities laws against foreign issuers of securities traded in the United States." *Id.* at 4. Toshiba has consistently maintained that *Morrison* allows enforcement of the U.S. securities laws against foreign issuers to the extent foreign issuers have entered the U.S. securities market by (1) registering their securities on a national securities exchange or (2) otherwise transacting in their securities in the United States. *See Morrison*, 561 U.S. at 273. The *Morrison* Court divined these two prongs from the statutory text of Section 10(b) — specifically "in connection with the purchase or sale of [1] any security registered on a national securities exchange or [2] any security not so registered" — read in light of the presumption against extraterritorial application of Congressional legislation. *Morrison*, 561 U.S. at 266-68. These prongs make sense because they ensure that the U.S. Exchange Act will apply only to foreign issuers that have taken affirmative steps to enter the U.S. securities market. Here, Plaintiffs have not pled — and cannot plead — that Toshiba has registered its securities on a national securities exchange or otherwise transacted in its securities in the United States.

1. Plaintiffs Fail To Satisfy *Morrison*'s First Prong Because An Over-The-Counter Market Is Not A National Securities Exchange Under Section 10(b)

Plaintiffs cannot satisfy *Morrison*'s first prong because Toshiba has not registered the ADRs (or any other security) on any "national securities exchange." *Morrison*, 561 U.S. at 266 (quoting Section 10(b)); *see* Mem. at 6-7, 12-13. In establishing the first prong, the *Morrison* Court began by observing that Section 10(b) refers to "the purchase or sale of any security registered on a national

securities exchange." 561 U.S. at 266 (quoting Section 10(b)). The Court proceeded to acknowledge the "primacy of the domestic exchange" in the U.S. Exchange Act's regulatory scheme. And in concluding its discussion of the first prong, the Court again expressly tethered that prong to "securities listed on national securities exchanges": "The Act's registration requirements apply only to securities listed on national securities exchanges." *Id.* at 267. The Third Circuit decision in *Georgiou*, the only federal court of appeals to address the issue directly, held that securities traded over the counter do not satisfy *Morrison*'s first prong because OTC markets are not "national securities exchanges." 777 F.3d at 134-35. As *Georgiou* observes, the SEC and OTC authorities themselves acknowledge that OTC markets are not "national securities exchanges." *Id.*

Here, Plaintiffs do not contend that the OTC market on which the ADRs traded was a "national securities exchange"; indeed, Plaintiffs seem to concede otherwise. Opp'n at 7 ("the OTC market may not be a 'national securities exchange'"). But Plaintiffs argue that *Morrison*'s first prong does not require a "national securities exchange" after all, and that any type of "exchange" will satisfy the first prong. *Id.* at 6-7. And Plaintiffs — citing to Section 3(a)(1) of the Exchange Act (15 U.S.C. § 78c) ("a market place or facilities for bringing together purchasers and sellers of securities") — add that the OTC market "plainly" qualifies as an "exchange," even if not as a "national securities exchange." Opp'n at 6. (To Plaintiffs, this proposition is so "plain[]" as to not even need supporting authority.) Nonetheless, Plaintiffs' argument is mistaken for two distinct reasons.

First, while Plaintiffs are correct that the Court in *Morrison* sometimes refers to "domestic exchanges" (Opp'n at 6-7), the context of the Court's opinion establishes that this term is simply synonymous shorthand for "national securities exchanges." (As discussed below, the terms are in fact essentially synonymous.) *Morrison* explicitly created its first prong based on the statutory text of Section 10(b), which refers to "national securities exchange." And *Morrison* repeatedly

refers to the first prong applying to securities "registered" (or "listed") on "national securities exchanges" or "domestic exchanges," while adding that the Act's registration requirements "apply only to securities listed on national securities exchanges." *Morrison*, 561 U.S. at 267. *Morrison* thus makes clear that its first prong applies only to securities "registered" on "national securities exchanges," and that the occasional use of the term "domestic exchange" (or "American stock exchange") did not broaden the scope of prong one. *See also id.*, at 273 (Breyer, J., concurring) (expressing understanding that first prong of Court's opinion applies to "national securities exchange[s]").

Second, Plaintiffs' reliance on *Morrison*'s use of the term "domestic exchange" is misplaced for the separate reason that the OTC market is not a "domestic exchange"; the OTC market is not an "exchange" at all. Plaintiffs' Amended Complaint (¶ 25) acknowledges that the ADRs at issue here are traded on the OTC market operated by OTCMarkets Group (specifically OTC Link). The SEC defines that market not as an exchange, but as "an electronic inter-dealer quotation system," stating that "[m]arket makers and other broker-dealers who buy and sell OTC securities can use OTC Link to publish their bid and ask quotation prices." OTC Link LLC, SEC http://www.sec.gov/answers/pink.htm (May 2010) (internal quotation marks omitted). The SEC adds: "OTC Link is registered with the SEC as a broker-dealer and as an *alternative trading system*, and is a member of FINRA. OTC Link does not require companies whose securities are quoted on its systems to meet any listing requirements." *Id.* (emphasis added). Under SEC Rule 3a1-1(a) (entitled "Exemption from the definition of 'Exchange' under Section 3(a)(1) of the Act"), adopted in 1998, an alternative trading system (ATS) is "exempt from the definition of the term 'exchange' under section 3(a)(1) of the Act" (subject to an exception not relevant here). When issuing final Rule 3a1-1, the SEC stated in its release: "[T]he Commission notes that its exemption for alternative trading systems applies to the definition of exchange. By exempting

alternative trading systems from this definition, the Commission is making clear its view that these systems should not be treated as exchanges under the Exchange Act or in any other context." Regulation of Exchanges and Alternative Trading Systems, SEC Release No. 34-40760, 1998 WL 849548, at *23 (Dec. 22, 1998) ("Regulation ATS"); *see also Strom v. United States*, 641 F.3d 1051, 1063 (9th Cir. 2011) ("We owe substantial deference to the SEC's published interpretation of its own regulations and will treat it as controlling if it is not plainly erroneous or inconsistent with the regulations.") (internal alterations, quotation marks, and citation omitted). As an alternative trading system that is registered as a broker-dealer, OTC Link is not — and cannot be considered — an "exchange."

If OTC Link were an "exchange," it would have to register as a "national securities exchange" or obtain from the SEC an exemption from that registration requirement. *See* 15 U.S.C. § 78(e). (This requirement is why "domestic exchange" is practically synonymous with "national securities exchange": if the former but not the latter, the exchange is operating in violation of law or has an exemption.) OTC Link has neither registered as a "national securities exchange" nor obtained an exemption from such registration; it is not required to do either because it is not an "exchange."

As a last gasp in their effort to invoke *Morrison*'s first prong, Plaintiffs challenge *Georgiou* as wrongly decided. Opp'n at 7-8. But *Georgiou*, the most authoritative and persuasive decision on the issue, is sound in its analysis: *Morrison*'s first prong requires that the security at issue be registered on a "national securities exchange" and a security traded over the counter does not qualify. Plaintiffs also point out that *Georgiou* recognized contrary authority from the Eleventh Circuit and this District, referring to *United States v. Isaacson*, 752 F.3d 1291 (11th Cir. 2014), and *SEC v. Ficeto*, 839 F. Supp. 2d 1101 (C.D. Cal. 2011). *See* Opp'n at 8. Neither case helps Plaintiffs.

Isaacson does not hold that an OTC market is a "national securities

exchange" for purposes of *Morrison*'s first prong. Rather, in holding that "Mr. Isaacson's conduct meets *Morrison*'s requirements for a U.S. nexus" (752 F.3d at 1299), the court observed that an expert witness testified that the securities at issue there were traded on OTC markets, and that these "are 'similar to' the NYSE and the NASDAQ, which are both American markets." *Id.* The court did not state that it considered this testimony relevant to *Morrison*'s first prong. *See id.* The court further observed that the fund at issue "was run out of New York City," and that the defendant's "office was located in Florida, which supports the inference that the Lancer Fund purchased the securities in the United States." *Id.* (internal quotation marks omitted). The evidence the court discussed suggests that the court determined that *Morrison*'s second prong — not the first — had been satisfied.

Ficeto involved allegedly fraudulent purchases and sales of securities by defendants on a domestic OTC market. 839 F. Supp. 2d at 1103-04. This Court (then-District Judge King) correctly held that the U.S. Exchange Act applied to the transactions, but — without the benefit of the later *Georgiou* decision — mistakenly relied upon *Morrison*'s first prong, instead of the second. *Id.* at 1106-17. This Court was justified in finding that the U.S. Exchange Act applies to OTC markets as well as to securities exchanges (*id.* at 1109-10), but erred in shoehorning OTC transactions into *Morrison*'s first prong, when such transactions fit comfortably in the second prong if — as in *Ficeto*, but not here — the defendants have engaged in the OTC transactions. In any event, notwithstanding its misreading of *Morrison*'s first prong, *Ficeto* does not help Plaintiffs, because it also concluded that ADRs fall outside the U.S. Exchange Act:

> Cases have similarly held that § 10(b) does not reach transactions in a foreign company's shares that are traded only on a foreign exchange but where American Depositary Receipts (ADRs) representing those shares are listed and traded on an American exchange. In these cases, courts have held that ADRs are merely placeholders for the ordinary

> shares traded on foreign exchanges, and thus allowing § 10(b) claims to survive would likewise be contrary to the spirit of *Morrison*.

Id. at 1115 (citing *In re Vivendi Universal*, 765 F. Supp.2d at 512; *Société Générale*, 2010 WL 3910286). *Ficeto* went on to state that "[t]hese cases seem particularly correct," and that "[t]hese cases do not undermine our decision, as the securities in this case were not traded on any foreign market." *Id.* at 1115 & n.12.

Plaintiffs, in short, cannot rely upon *Morrison*'s first prong, because the ADRs they purchased were not registered on any "national securities exchange." Plaintiffs cannot rely upon OTC trading in those ADRs, instituted by third party depositary banks, as a basis for invoking the first prong against Toshiba. *See also Pinker*, 292 F.3d at 371 (holding that to be liable under the U.S. Exchange Act, foreign issuer must have taken "affirmative steps purposefully directed at the American investing public").

2. Plaintiffs Fail To Satisfy *Morrison*'s Second Prong Because Toshiba Had No Involvement In Any Domestic Transactions

Plaintiffs' fall-back reliance on *Morrison*'s second prong (Opp'n at 9) also fails, because, while the Amended Complaint certainly alleges that Lead Plaintiff purchased ADRs in the United States (Am. Compl. ¶ 20), it does not — and cannot — allege that Lead Plaintiff purchased ADRs in a transaction with Toshiba. In fact, the Amended Complaint is devoid of any allegation that Toshiba had any role in Lead Plaintiff's ADR purchases or that Toshiba engaged in any securities transactions in the United States whatsoever. As *Morrison* states, the U.S. Exchange Act expressly does not apply to "any person insofar as he transacts a business in securities without the jurisdiction of the United States." 561 U.S. at 268 (quoting Section 30(b) of the Act (15 U.S.C. § 78dd(b))).

Not surprisingly, Plaintiffs do not cite any case in which a court has found a foreign issuer (or other person) subject to the U.S. Exchange Act where the issuer (or other person) is not alleged to have participated in securities transactions in the

United States. In contrast, under circumstances analogous to those here, the Second Circuit in *Parkcentral* held that the U.S. Exchange Act cannot be applied against a foreign defendant who had no role in the plaintiffs' domestic transactions. 763 F.3d at 215-18 (holding that domestic nature of transaction is necessary but not sufficient condition for satisfying *Morrison*'s second prong). While Plaintiffs contrive factual distinctions between *Parkcentral* and this case, those distinctions are not material and Plaintiffs are left arguing — as they did with *Georgiou* under the first prong — that the most authoritative and persuasive decision on the issue was "wrongly decided." Opp'n at 19-20.

Similarly, this Court (District Judge Fischer) in *Stackhouse* found that the U.S. Exchange Act cannot apply unless the transaction at issue was "explicitly solicited by the issuer in the United States" (2010 WL 3377409, at *1), such that a purchaser of common stock in Japan would have no claim but a purchaser of sponsored ADRs on the NYSE would have a claim. Plaintiffs can only attempt to distinguish *Stackhouse* on the basis of its procedural posture. Opp'n at 17-18.

Plaintiffs cannot point to any role that Toshiba had in Plaintiffs' U.S. purchases of ADRs, or any "explicit[ ] solicit[ation]" by Toshiba in the United States. The Amended Complaint does not allege that Toshiba was the counterparty on any of Plaintiffs' purchases or that Toshiba had any other role in those U.S. transactions. The Amended Complaint is simply devoid of any factual allegations that Toshiba has taken any actions to enter the U.S. securities market. In the absence of any such factual allegations, Plaintiffs can offer up only specious legal arguments and unsupported characterizations.

For example, Plaintiffs boldly declare that "[n]umerous courts" have found foreign issuers subject to the U.S. Exchange Act based on ADRs, and Plaintiffs purport to provide a list of such cases in their footnote 10. Opp'n at 10 & n.10. Plaintiffs neglect to note that every one of the cases they cite in footnote 10 involved sponsored ADRs (or similar instruments) registered on a national

securities exchange. (Only sponsored ADRs can be registered on an exchange. Mem. Ex. 2 (SEC Investor Bulletin), at 2). These facts are apparent from the text of each case, with the exception of *China Mobile Games*, in which its exchange listing is apparent from the complaint in that case. Consol. Sec. Class Action Compl. at ¶ 8, *In re China Mobile Games*, 2016 U.S. Dist. LEXIS 29258 (No. 14-CV-4471).

Plaintiffs cite three additional cases in the text of their Opposition (Opp'n at 10) — *Wu*, *Martoma*, and *Compania Internacional Financiera* — but those cases are also inapposite. *Wu*, 883 F. Supp. 2d at 250-53 (involving sponsored securities sold directly to plaintiff by foreign issuer in the United States); *Martoma*, 2013 U.S. Dist. LEXIS 176998, at *3 (denying motion to dismiss in criminal insider-trading case involving sponsored ADRs listed on the New York Stock Exchange); *Compania Internacional Financiera*, 2011 U.S. Dist. LEXIS 83424, at *6 (granting preliminary injunction in connection with "insider trading in the domestic securities of Arch stock listed on the NYSE"). In the latter two of these cases, no foreign issuer was even a party.

Here, of course, there is no allegation that the ADRs are sponsored, and in fact Plaintiffs *admit* that the ADRs are "unsponsored." Plaintiffs' Judicial Notice Objections at 7 ("[P]laintiffs do not dispute that TOSYY is unsponsored . . . .). The ADRs were created and issued by third-party depositary banks. Plaintiffs do not cite a single case in which a U.S. Exchange Act claim has been permitted to proceed against a foreign issuer based on unsponsored ADRs. The idea of such a claim is so audacious that it appears that few, if any, plaintiffs are willing to bring one.

Plaintiffs next attempt to conflate the distinction between the unsponsored ADRs and Toshiba's common stock sold in Japan, as though such a contrivance could somehow make Toshiba a participant in Plaintiffs' ADR purchases. Opp'n at 11 (asserting that ADRs are "Toshiba securities"). This effort is a reprisal of

similar characterizations in the Amended Complaint, addressed in Toshiba's opening memorandum. Mem. at 2-3. *See Twombly*, 550 U.S. at 545 (holding that complaint "requires more than labels and conclusions" to survive Rule 12(b)(6) motion). In reality, ADRs and common stock are entirely distinct financial instruments. *See* Mem. at 3-7; *Pinker*, 292 F.3d at 367 (stating that an ADR "*represents* a specified amount of foreign security") (emphasis added); *id.* ("The holder of an ADR is not the title owner of the underlying shares.") *Parkcentral*, 292 F.3d at 207 n.9 (same); Mem. Ex. 2 (SEC Investor Bulletin) ("An ADR may represent the underlying shares on a one-for-on basis, or may represent a fraction of a share or multiple shares."). Here the depositary banks apparently purchased Toshiba common stock on the stock exchanges in Japan and chose to have the ADRs represent six shares of Toshiba common stock.

Plaintiffs' contention that the main difference between sponsored and unsponsored ADRs is "administrative" (Opp'n at 15) betrays a misunderstanding of ADR programs (*see* Mem. at 4-5 (discussing myriad of differences between sponsored and unsponsored ADR programs)). To begin with, the foreign issuer does not raise any capital upon the issuance and sale of unsponsored ADRs. Furthermore, the foreign issuer does not become obliged to make SEC filings and disclosures upon the issuance of unsponsored ADRs. In fact, the foreign issuer is a stranger to any transaction involving unsponsored ADRs. Plaintiffs' effort to recast their purchases as some kind of "direct investment" in Toshiba cannot obscure that Toshiba did not transact in the ADRs in the United States or elsewhere. As a matter of law, Toshiba was not a participant in any transactions involving unsponsored ADRs. *Cf. Georgiou*, 777 F.3d at 135-37 (finding second prong applicable because defendant participated in transaction in the United States).

Lacking a connection between Toshiba and the unsponsored ADRs, Plaintiffs argue that "Toshiba's consent to the sale of its shares in the United States should be implied from its lack of objection or any action to prevent the sale of its shares as

unsponsored ADSs in the United States." Opp'n at 14. But the Amended Complaint does not allege any lack of objection or other action to prevent the sale of ADRs. *See Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003) ("In determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss.") (emphasis in original, internal quotation marks and citation omitted). Even if it had, any objection by Toshiba would have been irrelevant because the SEC specifically considered and rejected proposals that would have required depositary banks to seek consent from foreign issuers or allowed foreign issuers to object to the creation of an ADR program. *See* Mem. at 5 (describing proposals SEC rejected); Opp'n at 13 (acknowledging the SEC's actions).

That two depositary banks that later issued the unsponsored ADRs here opposed the proposed regulations (Opp'n at 13) is irrelevant, as neither referred to Toshiba and both had every incentive to oppose regulations impeding their creation of unsponsored ADRs. Furthermore, whatever these banks may have said in their advocacy to the SEC about pre-2008 practices does not bear on whether the banks obtained "implied consent" from Toshiba. In any event, Plaintiffs' unpleaded speculation about "implied consent" is a red herring, because passive non-objection by a foreign issuer cannot make an issuer a participant in any ADR transaction that may occur without its involvement.

Plaintiffs further assert (again without citation) that because Toshiba falls under Rule 12g3-2, the Court should infer that Toshiba has facilitated the sale of unsponsored ADRs. Opp'n at 1-2, 14. As Toshiba has explained, under Rule 12g3-2 Toshiba has no U.S. securities law registration or reporting obligations. Mem. at 8. Plaintiffs acknowledge that a foreign issuer does not have to take any action to fall under Rule 12g3-2, as long as the foreign issuer's securities "are listed on a *regulated foreign exchange* and the issuer publishes English-language

versions" of public disclosures required under foreign securities regulations. Opp'n at 12-13 (emphasis added). Plaintiffs thus concede that to fall under Rule 12g3-2, the foreign issuer must be subject to *foreign* — not U.S. —regulation. Irrespective of Rule 12g3-2, that Toshiba publishes its financial information in English for the benefit of counterparties, creditors, subsidiaries, employees and investors (among others) is hardly surprising. *In re Optimal U.S. Litig.*, 837 F. Supp. 2d 244, 254 (S.D.N.Y. 2011) (recognizing that English is "the language of international commerce"). English-language publication certainly cannot evidence Toshiba's involvement in Plaintiffs' ADR purchases.

Plaintiffs also urge the Court to save their case because "in Toshiba's view, American investors who purchased its shares as ADSs should not have a remedy for fraud anywhere in the world simply because those securities were 'unsponsored.'" Opp'n at 15. But, as Toshiba has observed, the depositary banks — as title owners of Toshiba common stock — may have a claim under Japanese law. Mem. at 14. Plaintiffs somehow take this to mean that Toshiba believes that the ADR holders do *not* have any legal remedy, and they assert that the depositary agreements provide that the depositary banks "will not institute or participate in any such action." Opp'n at 15 (emphasis in original). Actually, every Form F-6 that Plaintiffs cite (*see id.* at 15 n.16) states (using almost identical language) that the depositary banks "shall be under no obligation" to commence litigation (Mem. Ex. 6 at 47); thus, the depositary banks are free to initiate litigation.

The depositary banks have the same rights as any shareholder. The contractual agreement between the depositary banks and the ADR holders expressly provides that the depositary banks "shall distribute or otherwise make available to the [ADR] Holder . . . any distributions of cash and securities . . . and any other distribution with respect to the Deposited Securities . . . ." Mem. Ex. 6 at 44. Presumably, this would entitle the ADR holders to any recovery the depositary banks may secure through shareholder litigation. Any right the ADR purchasers

may have vis-à-vis the depositary banks does not create any relationship between the ADR purchasers and Toshiba. Indeed, if both depositary banks and ADR holders had claims against Toshiba, the company would face duplicative damages.

B. <u>Plaintiffs Fail To Overcome The Comity Concerns That Compel Dismissal Of Plaintiffs' Japanese Exchange Act Claim</u>

Plaintiffs misapprehend Toshiba's argument regarding the application of foreign law in two critical respects. Toshiba does not argue that the comity concerns articulated in *Morrison* would be satisfied by a U.S. court's application of foreign securities law. Opp'n at 26 (quoting Mem. at 11). Rather, *Morrison*, recognizing that "foreign countries regulate their domestic securities exchanges," warned against "interference with foreign securities regulation" resulting from differences in securities regulation between countries, including "what disclosures must be made . . . what discovery is available in litigation, what individual actions may be joined in a single suit . . . and many other matters." 561 U.S. at 269-70. The risk of interference is particularly acute where a foreign regulator has commenced its own inquiry or where the matter is already the subject of foreign civil litigation (*see* Wada ¶ 10). The risk of disparate treatment of overlapping issues, witnesses and evidence also could compromise the integrity and efficiency of foreign civil or criminal proceedings. *Cf., e.g.*, *Garcia v. City of King City*, No. 14-cv-01126, 2015 U.S. Dist. LEXIS 46741, *12-14 (N.D. Cal. Apr. 8, 2015) (balancing factors and staying U.S. civil class action to avoid interference with pending U.S. criminal action).

Further, Toshiba's position is not, as Plaintiffs suggest, that foreign law can never be applied by U.S. courts. Opp'n at 27, 30. Instead, relying on *Morrison* and this Court's decision in *Toyota*, Toshiba argues that *Morrison*'s comity concerns specific to foreign regulation of securities exchanges would be "subverted" by permitting U.S. litigation of Plaintiffs' Japanese-law claim. *See* Mem. at 17 (quoting *In re Toyota*, 2011 WL2675395, at *7 (citing *Morrison*, 561 U.S. at 269)).

As this Court recognized in *Toyota*: "Several of the issues that the Supreme Court [in *Morrison*] was concerned with were procedural and *would apply with equal force* to supplemental jurisdiction over foreign claims." *In re Toyota*, 2011 WL2675395, at *7 n.11 (emphasis added). Plaintiffs state that this Court's decision in *Toyota* was "not a rigorous analysis of international comity" (Opp'n at 26-27), but this Court properly relied on *Morrison*'s "clear underlying rationale" that "foreign governments have the right to decide how to regulate their own securities markets" (*In re Toyota*, 2011 WL 2675395, at *7 (citing *Morrison*, 561 U.S. 247)). That the Court in *Toyota* was considering comity in the context of supplemental jurisdiction does not diminish the relevance of the case here (Opp'n at 23), because Plaintiffs themselves assert supplemental jurisdiction over Plaintiffs' Japanese Exchange Act claim. Am. Compl. ¶ 13.

In any event, Plaintiffs' authorities (Opp'n at 27) are inapplicable because they involved claims primarily founded on U.S. law and are otherwise unrelated to foreign securities regulation. *See GDG Acquisitions*, 749 F.3d at 1030, 1032-33 (reversing comity-based dismissal of "garden-variety commercial contract" claims against U.S. seller where "*American law applies*," and defendant had expressly agreed to "the exclusive jurisdiction of any of the federal and state courts in the State of Florida in any action") (emphasis added; citation omitted); *Bigio*, 448 F.3d at 178-79 (reversing comity-based dismissal of U.S. "*common law* claims [which] may also require some modest application of Egyptian law") (emphasis added). In fact, Plaintiffs do not cite a single case in which a U.S. court adjudicated a foreign securities law claim — including where plaintiffs were U.S. investors.

Notwithstanding Plaintiffs' argument (Opp'n at 25 (citing *Mujica*, 771 F.3d at 599)), deference to comity considerations does not require pending litigation in Japan. *Mujica* establishes that courts may apply adjudicatory comity "to abstain from exercising jurisdiction due to a past *or potential* judicial proceeding elsewhere." 771 F.3d at 600-01 (emphasis added). Thus, Plaintiffs' election (so

far) to sue only here (*see* Opp'n at 24) does not preclude this Court from deferring to Japan's overwhelming interest in regulating its own securities market and adjudicating Japanese securities law claims at home.

Further, Plaintiffs do not deny that the primary consideration in a comity analysis is the location of the alleged misconduct. *See* Mem. at 17 (quoting *Mujica*, 771 F.3d at 604-05). And Plaintiffs concede that the alleged misconduct here took place at Toshiba headquarters in Japan. *See, e.g.*, Am. Compl. ¶¶ 3-10, 22-24, 28, 155-241; Opp'n at 1-2. Plaintiffs' assertion that the inclusion of Toshiba's worldwide operations in its consolidated financial statements creates a U.S. nexus (Opp'n at 27-28) does not surmount the inescapable fact that the financial statements — and the alleged misstatements in them — were prepared and issued in Japan. Even with respect to the Westinghouse financials (Opp'n at 28-29), Plaintiffs do not allege any misstatements or omissions by Westinghouse (*see* Am. Compl. ¶¶ 121-144). Under the "guiding principle" confirmed by *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013), and its progeny, "the weaker the nexus between the challenged conduct and U.S. territory or U.S. parties, the weaker the justification for adjudicating the matter in U.S. courts and applying U.S. federal or state law." *Mujica*, at 605-06 (citing *Kiobel*, 133 S. Ct. at 1664).

Plaintiffs rely on *TEPCO* to argue that the U.S. connections here can override the strong preference for litigation in Japan. Opp'n at 29. *TEPCO* involved, however, very different allegations and circumstances. There, plaintiffs were U.S. service-members allegedly injured by TEPCO's negligence while providing humanitarian assistance on behalf of the United States after the nuclear disaster at Fukushima. *TEPCO*, 2015 WL 10687594, at *1. The plaintiffs, many California residents too ill to travel to Japan for trial, brought claims under U.S. law. *Id.* at *18, 20. Under those particular circumstances, the *TEPCO* court concluded that the United States would be a "more reasonable" forum. *Id.* at *23. Here, in contrast, Plaintiffs (i) are primarily institutional investors, (ii) were not acting on behalf of

the United States, (iii) have not alleged any impediment to participating in litigation in Japan, (iv) purchased, in Japan, the stock of a Japanese company listed only on Japanese stock exchanges (or a synthetic security offered by a depositary bank without any involvement of Toshiba), and (v) bring claims under Japanese law. *See id.*; Mem. at 19-20. Each of these considerations supports litigation in Japan — not the United States.

Given the foregoing, any U.S. interest does not override Japan's interest. Plaintiffs do not dispute the strength of Japan's interest — including that regulation of Japan's securities markets through the Japanese Exchange Act is a "core prerogative" of Japan. Mem. at 18 (citing *Mujica*, 771 F.3d at 606). Instead, Plaintiffs assert that the U.S. interest is stronger. Opp'n at 28.

But Plaintiffs ignore *Morrison* and other cases which explain with respect to the U.S. Exchange Act that "[n]othing suggests that this *national* public interest pertains to transactions conducted upon *foreign* exchanges and markets." 561 U.S. at 263 (emphasis in original); *Cheng*, 708 F.2d at 1411 ("The presence of American plaintiffs, however, is not in and of itself sufficient to bar a district court from dismissing a case on the ground of *forum non conveniens*."). And *Ernst & Ernst*, 425 U.S. at 194-95 (Opp'n at 28, 30), says nothing about protecting U.S. investors who purchase securities issued and sold outside the United States and regulated abroad. *See Howe v. Goldcorp Investments, Ltd.*, 946 F.2d 944, 951 (1st Cir. 1991) (Breyer, J.) (finding no "reason to believe [federal securities] laws seek so strongly to protect Americans who bought their shares *abroad* from misrepresentations (or violations of fiduciary duty) primarily taking place *abroad*" as to bar dismissal of securities claims under *forum non conveniens* where "most of the background facts that might show [the alleged] statements or omissions to be materially false or misleading occurred in Canada") (emphasis in original).

Moreover, an investigation by U.S. authorities — paralleling a primary investigation by the foreign regulator — does not automatically favor private U.S.

litigation in the United States. Opp'n at 29-30. If anything, a class action suit is "not necessary" given that the U.S. authorities are "fully capable of validating the United States' interest in policing the securities market by bringing suit on [their] own." *See In re Banco Santander Sec.-Optimal Litig.*, 732 F. Supp. 2d 1305, 1343 (S.D. Fla. 2010) (weighing U.S. interest under *forum non conveniens* analysis).

Separately, the ADR purchasers' potential inability to bring suit in Japan would not render Japan an inadequate forum. If the ADR purchasers cannot bring a claim under the Japanese Exchange Act in Japan (Opp'n at 25, 32), then they cannot bring that same claim in this Court either. *See Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1240 (11th Cir. 2004) (holding legal obstacles under foreign law would be the same in U.S. court as in alternative foreign forum). But even if the ADR purchasers cannot bring a claim under the Japanese Exchange Act, their inability to sue would not be "the same as stating that the Plaintiffs have no remedy under [Japanese] law." *In re Banco Santander*, 732 F. Supp. 2d at 1332 (finding remedy in Irish courts adequate despite defendant's argument that under Irish law plaintiffs' claims "would fail as a matter of law because they are derivative claims which the Plaintiffs would not have standing to pursue"). The Ninth Circuit in *Mujica* determined that Colombia was an adequate alternative forum despite finding that plaintiffs would be "barred by Colombian law" from recovery against defendants due to their strategic choice of forum. 771 F.3d at 614-15; *see also Ungaro-Benages*, 379 F.3d at 1240 (finding alternative forum adequate despite possible statute-of-limitations bar).

Indeed, by virtue of their Japanese-law claim, Plaintiffs necessarily assert that the Japanese Exchange Act provides a remedy for the alleged misconduct. *See* Opp'n at 23 ("[T]he alleged misrepresentations are actionable under both U.S. and Japanese law."); Am. Comp. ¶ 306 ("Toshiba is therefore liable under Article 21-2 to compensate plaintiffs for damage . . . ."). As in *TEPCO*, "Japan is an adequate alternative forum" because Toshiba is "amendable to service in Japan," "Japanese

courts are well-respected and independent of government control and Plaintiffs provide no evidence to the contrary." *See TEPCO*, 2015 WL 10687594, at *17; *id*. at *3 n.1 ("[T]he *Mujica* court held that the focus should be on procedural fairness in the forum and whether *the opponent* has presented specific evidence of significant inadequacy.") (emphasis added) (citing *Mujica*, 771 F.3d at 607-08); *see also Lockman Found.*, 930 F.2d at 769 & n.3 (collecting cases finding Japan an adequate forum).

C. <u>Plaintiffs Fail To Overcome Toshiba's Showing That The Inconvenience Of U.S. Litigation Compels Dismissal</u>

Plaintiffs cannot justify this Court as the appropriate forum under *forum non conveniens* (Opp'n at 31-39):

First, Plaintiffs' choice of forum deserves little deference because Plaintiffs represent a putative class with potentially divergent interests. Mem. at 21-22 (citing *Lou*, 834 F.2d at 739). Plaintiffs are incorrect (Opp'n at 32-33) that this interest-balancing rule, which the Ninth Circuit in *Lou* applied to a transfer motion under Section 1404(a), should not apply here. *See Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 580 (2013) (holding that "both § 1404(a) and the *forum non conveniens* doctrine from which it derives entail the same balancing-of-interests standard" and "relevant factors") (internal quotation marks and citation omitted). Moreover, long before codification of Section 1404(a), the Supreme Court stated that under *forum non conveniens*, the forum preference of class representatives deserves less deference. *See Koster*, 330 U.S. at 525 (holding plaintiff's claim that its home forum is appropriate "is considerably weakened" where plaintiff represents a class — even where plaintiff makes a "real showing of convenience").

Here, Plaintiffs' purported preference for this jurisdiction is diluted further because this District is *not* Plaintiffs' "home forum." *See id.*; Civil Cover Sheet (Dkt. No. 2) (listing Mark Stoyas as resident of "Lake County, IL"); Am. Compl.

¶ 19 (alleging Lead Plaintiff "based in Alameda, California"); *id.* ¶ 20 (alleging named plaintiff New England Teamsters & Trucking Industry Pension Fund "based in Burlington, Massachusetts"); *Gemini Capital Grp., Inc. v. Yap Fishing Corp.*, 150 F.3d 1088, 1091-92 (9th Cir. 1998) (affirming dismissal on *forum non conveniens* where U.S. plaintiffs brought suit outside their home forum: "the district court correctly acted on Ninth Circuit authority in granting Plaintiffs' choice of Hawaii as a forum less deference"). Nor is the putative class limited to residents of this District — or even the United States. *See, e.g.*, Am. Compl. ¶ 270 (defining class of "ADS Purchasers" as "*all persons* who acquired Toshiba ADSs during the Class Period") (emphasis added). Given potentially "hundreds of thousands" of plaintiffs with no specified connection to this District (Am. Compl. ¶ 271), Plaintiffs' choice of forum warrants little deference.

Second, Plaintiffs cannot deny that most witnesses and evidence are located in Japan. Plaintiffs do not contest that the thirty-three potential witnesses and the evidence identified by Toshiba (and relied on by Plaintiffs in the Amended Complaint) are located in Japan. Mem. at 22-24; Wada ¶¶ 5-9. Still, Plaintiffs argue that the Court cannot consider the inconvenience of U.S. litigation to these witnesses, because Toshiba has not proven the "nature and relevance" of their testimony. Opp'n at 33. But Plaintiffs have necessarily assumed the relevance and materiality of this evidence, because the Amended Complaint itself refers to these witnesses and evidence. Specifically, the Amended Complaint refers to nine former Toshiba executives, by name, 96 times. (Makoto Kubo, for example, former Toshiba CFO, is mentioned thirteen times. Am. Comp. ¶¶ 5, 63-64, 69, 88, 93, 105, 110, 169, 172, 174, 177, 289) The Amended Complaint also identifies by name twenty-four former Toshiba executives who Plaintiffs assert "control[led] or influenc[ed] the business practices or conditions giving rise to the securities violations alleged." Am. Compl. ¶¶ 289-93. Finally, Plaintiffs base the bulk of their allegations on the findings of the Special Investigation Committee and the

Independent Investigation Committee. *See*, *e.g.*, Am. Compl. ¶¶ 38-40, 50, 156. The members of these committees, identified by Toshiba (Wada ¶¶ 6, 8), are uniquely qualified to attest to their findings. The testimony of all of these witnesses, none of whom resides in the United States (Wada ¶¶ 5, 6, 8), is, at least to Plaintiffs, evidently relevant and material to Plaintiffs' claim.

Plaintiffs' assertion that "discovery will occur primarily in the United States" (Opp'n at 33), is baseless. Plaintiffs exaggerate when they assert that Toshiba has eliminated the need for discovery in Japan by "admitt[ing]" liability for any accounting fraud, including in Japan. *Id.* And Toshiba's worldwide operations covered in its financial statements are centered in Japan, and operations in the United States are merely one example of Toshiba's many non-Japanese operations. Furthermore, Plaintiffs allege misconduct *only* in Japan, even if some allegations relate to U.S. entities such as Westinghouse. Any communications and documents related to the alleged misconduct — accounting treatment — still would be primarily located in Japan. Indeed, notwithstanding their criticism of Toshiba's purported lack of specificity in identifying willing witnesses (Opp'n at 34-35), Plaintiffs themselves have failed to identify *any* specific U.S. witnesses or evidence (*id.* at 33-34). Nor have Plaintiffs submitted any evidence that litigation in the United States would be more convenient than litigation of Plaintiffs' claim in Japan. In any event, under 28 U.S.C. § 1782, interested parties may obtain discovery in the United States for use in proceedings in Japan.

Moreover, Plaintiffs do not dispute that unwilling witnesses in Japan cannot be compelled to testify in the United States. Instead, Plaintiffs contend — without regard to their own Amended Complaint — that it is unclear which witnesses would be unwilling to testify (Opp'n at 34), and the relevance and materiality of any unwilling witnesses has not been shown (*id.* at 35).

The Amended Complaint, however, alleges that ten witnesses left Toshiba as a result of misconduct and that five have been sued by the company. Am. Compl.

¶¶ 48, 63-64, 66. These former Toshiba executives are indisputably beyond the reach of compulsory process. Under the circumstances, their willingness to provide testimony in U.S. litigation about accounting misconduct in which they were allegedly involved seems unlikely, particularly in the face of pending proceedings against them in Japan. In particular, the five former Toshiba executives that are the focus of Plaintiffs' Amended Complaint are adverse to Toshiba and potentially to Plaintiffs, and the Court may presume that these individuals will not willingly testify here. *See Contact Lumber Co. v. P.T. Moges Shipping Co. Ltd.*, 918 F.2d 1446, 1451 (9th Cir. 1990) (finding defendant could not compel appearance from the Philippines of witnesses who were "not employed by [defendant] nor within [its] control," including some employed by adverse third party). The likely unavailability of these key witnesses weighs heavily in favor of dismissal under *forum non conveniens*. *Id.*; *Lueck*, 236 F.3d at 1145 (listing factors); *see also Lockman Found.*, 930 F.2d at 770 ("When fraud charges are made, it is desirable that the factfinder have the benefit of demeanor testimony of witnesses.") (alterations, quotation marks, and citation omitted).

Plaintiffs also do not dispute Toshiba's authorities that evidence-gathering for U.S. litigation by letter rogatory is "time-consuming," "difficult," "costly," and "inefficient." Mem. at 23-24. Plaintiffs recognize that even voluntary depositions are burdensome. Pardieck ¶¶ 63-66 (commenting on special visa requirement for non-Japanese participants, limitation to written questions, requirement of consular supervision, and availability of only three deposition rooms in all of Japan); *see also id.* ¶ 65 (stating that litigants "should anticipate scheduling delays") (citation omitted).

In sum, the burden of U.S. litigation on even willing witnesses and the current Toshiba employees who reside outside the United States, the cost of bringing witnesses to the United States, and other practical problems, such as interpretation for non-English speakers and translation of Japanese documents, all

weigh heavily in favor of litigation in Japan. *See* Mem. at 22-24; *Lueck*, 236 F.3d at 1145 (citing *Gulf Oil*, 330 U.S. at 508).

Third, the application of Japanese law favors dismissal. Even though Plaintiffs dispute Toshiba's assertion of "unresolved issues" under the Japanese Exchange Act (Opp'n at 38-39), they admit that the entirety of the Japanese court system's experience with this law is limited. *See* Inoue, Ex. B. There are only three "*de facto* binding" interpretations of the Japanese Exchange Act available from the Japanese Supreme Court (*id.*; Pardieck ¶ 22), and Plaintiffs do not contest that these decisions address "only a limited number of issues" (Ishiguro ¶ 20). Plaintiffs also do not deny that the method for calculating the price of Toshiba's stock "but-for" the alleged misstatements — a key component of any damages claim — "remains unclear." *Id.* Thus, questions under the Japanese Exchange Act are best decided by the courts in Japan.

Finally, any local interest in the United States does not compare with the strength of the local interest in Japan. The handful of brief articles Plaintiffs submit from U.S.-based, global news outlets (Opp'n at 29 (referring to Exs. 9-16)) hardly reflects "substantial" U.S. attention — let alone any local interest greater than that of Japan (Mem. at 25). None of these stories refers to *any* specific U.S. impact, or any market other than Japan. Plaintiffs do not dispute that the *overwhelming* impact of Toshiba's accounting issues has fallen on Japan, where the vast majority of institutional and private shareholders reside, where the vast majority of Toshiba employees work, where Toshiba has been esteemed as a model corporation and a source of national pride, and where Toshiba's fortunes and misfortunes can have a material impact on the national economy. *See* Mem. at 17-18 (quoting, *inter alia*, statements of Japan's Deputy Prime Minister (Ex. 16)). Any residual impact on U.S. shareholders would be common to Toshiba shareholders worldwide.

III. CONCLUSION

For the foregoing reasons, the Court should grant Toshiba's Motion and dismiss the Amended Complaint in its entirety with prejudice.

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